No. 97-1159

Supreme Court, U.S.
FILED
MAR 13 1998
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

v.

ERIC CLEMMONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

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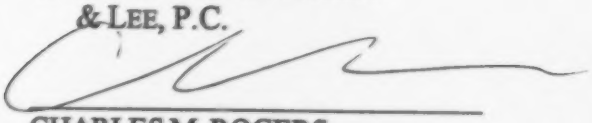
COMES NOW Eric Clemmons, Respondent herein, and moves this Honorable Court for leave to proceed *in forma pauperis* herein pursuant to Rule 39. Leave was granted allowing Respondent to proceed *in forma pauperis* in the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit. Counsel was appointed to represent Mr. Clemmons under the Criminal Justice Act, Title 18, United States Code, Section 3006A.

Respectfully submitted,

WYRSCH HOBBS MIRAKIAN
& LEE, P.C.

By: 

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A CLAIM IS "FAIRLY PRESENTED" TO THE STATE COURT WHEN INCLUDED IN *PRO SE* PLEADINGS FILED IN THAT COURT IN THE ABSENCE OF ANY REGULARLY APPLIED PROCEDURAL RULE PROHIBITING SUCH PLEADINGS.

II.

WHETHER RESPONDENT'S RIGHTS TO DUE PROCESS AND CONFRONTATION WERE VIOLATED WHEN THE TRIAL COURT ADMITTED THE DEPOSITION TESTIMONY OF A KEY PROSECUTION WITNESS WHEN THAT WITNESS NEVER TESTIFIED AT TRIAL, RESPONDENT HAD NO OPPORTUNITY TO ATTEND THE DEPOSITION, AND RESPONDENT DID NOT WAIVE HIS RIGHT TO CONFRONT THE WITNESS.

III.

WHETHER THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING THE CORRECT STANDARD FOR HARMLESS ERROR ANALYSIS WHEN THIS ISSUE WAS NEVER RAISED IN THE COURT OF APPEALS AND THE VIOLATION OF RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE CANNOT BE CONSIDERED HARMLESS UNDER EITHER STANDARD.

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II. Respondent's constitutional right to confront his accuser was violated when the trial court admitted the deposition testimony of a key prosecution witness when that witness never testified at trial, Respondent had no opportunity to attend the deposition, and Respondent did not waive his right to confront the witness. 18

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OPINIONS BELOW

Respondent adopts Petitioner's citation of the opinions below.

JURISDICTIONAL STATEMENT

Respondent adopts Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent adopts Petitioner's statement of constitutional and statutory provisions. In addition, Article I, Section 18(b), of the Missouri Constitution provides:

> Upon a hearing and finding by the circuit court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant, the state may take the deposition of such witness and either party may use the same at the trial, as in civil cases, provided there has been substantial compliance with such orders. The reasonable personal and traveling expenses of defendant and his counsel shall be paid by the state or county as provided by law.

STATEMENT OF THE CASE

Respondent essentially agrees with Petitioner's summary of the procedural history of this case although, as discussed below, he disputes Petitioner's description of the Eighth Circuit's opinion upon rehearing. After Respondent's conviction and death sentence were affirmed on direct appeal, Respondent unsuccessfully pursued post-conviction relief under Missouri Supreme Court Rule 29.15. During the 29.15 hearing, Petitioner testified about his attorney's failure to notify him of the deposition of a key prosecution witness, Captain Gross. Petitioner further testified that he was unaware of Gross' testimony until it was read into the record at trial. Respondent's testimony at the 29.15 hearing established that he did not consent to the taking of the deposition in his absence and, further, did not consent to its use at trial in violation of his right to confrontation.

In his federal petition for writ of habeas corpus, filed in the United States District Court for the Western District of Missouri, Petitioner pursued a number of claims. The District Court denied his petition, but noted that he had presented particularly strong claims concerning: (1) a violation of Brady v. Maryland, 373 U.S. 83 (1963), which involved the State's failure to turn over an investigative memorandum that summarized an eyewitness account in which another inmate, not Clemmons, was named as the perpetrator; and (2) a violation of the right to confrontation based on the introduction at trial of the deposition testimony that was taken in Respondent's absence

and which was used at trial without Respondent's consent or his knowing, voluntary, and intelligent waiver of his right to confrontation. The District Court ruled that both of these claims were procedurally barred. However, it held that absent a procedural bar, both of the claims appeared to be meritorious and would warrant the granting of the writ. See Clemmons v. Delo, Case No. 90-0943-CV-W-6 (W.D. Mo., July 7, 1995), A-57, A-66, A-75.[1]

The District Court denied relief, in part, because it failed to recognize that Mr. Clemmons had testified in his Rule 29.15 hearing that he was unaware of the deposition until it was read into the record and had not consented to the taking of the deposition or its admission at trial. The District Court stated: "No record was made during petitioner's testimony at the hearing that he had not been given an opportunity to be present during the Gross deposition." A-67. This misperception of the record persisted through the first opinion in the Eighth Circuit Court of Appeals, in which the appellate court affirmed the district court's denial of relief. Following that decision, Respondent changed counsel, and undersigned counsel was appointed. The Court of Appeals granted rehearing, and on August 28, 1997, filed a new opinion which vacated its earlier order of November 22, 1996. In the opinion issued following rehearing, the Court of Appeals noted that its earlier reading of the record had been incorrect.

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[1]All references to "A-__" are to Petitioner's Appendix, filed with the Petition for Writ of Certiorari.

Petitioner erroneously states in his statement of the case that: "Respondent, through counsel, declined to attend the deposition." See Petitioner's Petition at 4. This statement is directly contrary to uncontradicted testimony of Respondent at the Rule 29.15 hearing. Significantly, Petitioner's assertion is directly contrary to the Court of Appeals' opinion, which states:

> Clemmons testified at the 29.15 hearing that he had not known that his lawyer had taken a deposition of Captain Gross, and that he did not find out about the deposition until trial, when the prosecutor was discussing the introduction of the transcript with the judge. There is no evidence to the contrary in the record.

See A-26.

In its opinion issued after rehearing, the Court of Appeals determined that Petitioner had properly asserted and preserved all of his claims to the fullest extent of his ability in state court. The Court of Appeals acknowledged that in the appeal from the denial of the Rule 29.15 motion, appointed counsel had failed to raise certain issues on appeal. However, the Court noted that Mr. Clemmons had preserved his claims by first instructing his lawyer to raise them and, upon finding that counsel had not raised them, by instructing his counsel to file a supplemental brief. When counsel refused to file a supplemental brief with the additional points, Respondent then filed a motion for leave to file a *pro se* brief which listed in an attachment an additional 130 proposed claims that had been raised in the Rule 29.15 proceeding. The Missouri Supreme Court denied Respondent's request to file the *pro se* brief. The Court of Appeals

observed that the client always remains the master of his action, and that Respondent in this case had done all that he could to raise and preserve his claims, including stating those claims in his *pro se* pleading. Under the particular circumstances of this case, the Court of Appeals found that Respondent was not procedurally barred from raising his claims in federal court.

Petitioner filed a petition for rehearing by the Court of Appeals, which was denied by the court. Petitioner then filed the present petition for writ of certiorari.

Regarding Petitioner's statement of the factual background, Respondent asserts that Petitioner's rendition of the facts is highly selective and misleading on a number of points. For instance, the factual statement fails to acknowledge the significant doubt that surrounds Thomas Steigerwald's identification of Respondent as the assailant. The lighting in the prison yard after dark was poor, Steigerwald could not see the assailant's face at the time of the perceived assault, and a number of inmates identified another inmate, not Respondent, as the perpetrator. Significantly, the State had failed to turn over an investigative memorandum summarizing an interview with an eyewitness shortly after the event in which the witness had identified another person, not Respondent, as the perpetrator. A fuller statement of the factual history of this case follows:

On August 7, 1985, shortly before 9:00 p.m., several inmates had congregated in groups on the lawn near Housing Unit Three at the Missouri State Penitentiary in

Jefferson City, Missouri. Present at that time were inmates Henry Johnson, Fred Bagby, Justice Mays, Seymour Abdullah, Keith Brown, Wilbur Lewis, and Eric Clemmons among others. Johnson, who had a reputation for harassing inmates at the institution, was stabbed at that time and died shortly thereafter.

Three inmates present at the time of the stabbing, Mays, Abdullah, and Brown, testified at trial that Johnson physically assaulted Bagby and that Bagby then stabbed Johnson with a knife that Bagby had been carrying concealed under his clothing. These same inmates testified that Johnson took off running after the incident and that Johnson ran into Clemmons as Johnson was fleeing the scene in search of medical attention.

At the time of the incident, Corrections Officer Thomas Steigerwald was in the process of exiting the main corridor and proceeding to the upper lawn area when he noticed the commotion near Housing Unit Three. Steigerwald testified that he observed one inmate grab another, strike him in the chest, and then hit him with a roundhouse punch in the side.

Inmate Johnson then ran past Steigerwald, and Steigerwald saw that the front of Johnson's shirt and pants had blood on them. Steigerwald then radioed for help. Later, it was determined that Johnson had been stabbed with a flat-bladed instrument.

At trial, Steigerwald testified that Johnson's assailant was wearing a grey sweatshirt although he could not make out the assailant's face. Steigerwald agreed that the lighting conditions at the time of the stabbing could be described as "dark."

After radioing for help, Steigerwald followed two inmates who had started toward the prison's chapel. One of the inmates was wearing the grey-type sweatshirt and the other inmate wore a grey towel on his head. Steigerwald testified that he saw the two inmates' faces when they subsequently separated near the prison's chapel. The inmate in the grey sweatshirt was later identified by Steigerwald as Eric Clemmons and the other inmate was identified as Keith Brown.

Steigerwald testified that he got a brief glimpse of a knife in Clemmons' hand at the time the inmates separated. Steigerwald admitted that he just saw a flash of metal and did not see a knife handle. Clemmons wore metal-rimmed glasses, but he did not have the glasses on at the time that Steigerwald saw Clemmons. Subsequently, when Steigerwald caught up with Clemmons, Clemmons had his glasses in his hand and he was wearing a grey sweatshirt inside-out.

Clemmons did not have a knife in his possession. Although an extensive search was conducted, a knife was never found. Clemmons' sweatshirt had small, light smears of untypeable blood on the grey, right-side-out side of the sweatshirt. There was no testimony to show the blood was fresh. Clemmons was taken into custody without resistance and cooperated with investigators.

Clemmons and Johnson had previously been cellmates, but Clemmons had been allowed to relocate because Johnson had harassed Clemmons.[2] Clemmons told the intervening officer that the relocation would solve any problem he had with Johnson, and no problems were evident to the officer after the relocation. Clemmons denied that he had taken any part in the stabbing of Johnson.

The other inmate seen leaving the area with Clemmons, Brown, was later identified and his cell was searched. A hat and a book were found in Brown's cell. The book contained school work papers with Clemmons' name on them. A guard later testified that he thought he saw blood on the book. However, a serologist who testified found no traces of blood on the textbook. The hat had blood on it of type B or AB. Johnson's blood was type B. No testimony was presented to tie Clemmons to the hat.

The autopsy on Johnson revealed that he had been stabbed three times, once to his left side, once under his right arm, and once in the left side of his chest which penetrated Johnson's heart and was the fatal blow. Before Johnson died, Johnson said "they have stuck me in my heart."

Aside from Steigerwald's after-dark observations and the blood evidence, which was not inconsistent with defense testimony that Johnson ran into Clemmons, the primary evidence against Clemmons came through the testimony of a prosecution

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[2]Johnson's harassment, however, was not exclusive to Clemmons. Johnson had a reputation for the "conquest of other men in homosexual pursuits."

witness, Captain A.M. Gross, who was not even present at trial. With no objection from defense counsel, a deposition of Captain Gross was read into the record. Apparently, Gross' wife had just passed away, and the deposition was taken to allow Captain Gross to attend to family matters.

The deposition transcript reflects, and Clemmons' later testimony confirms that Clemmons was not present for the deposition and was not even aware that the deposition had been taken. In testimony at his Rule 29.15 hearing, Clemmons stated that he was unaware of the contents of the deposition until the deposition was read in open court.

Clemmons' ignorance of Captain Gross' testimony is particularly significant because Gross testified that Clemmons made an inculpatory admission to him, stating: "I guess they got me." At his 29.15 hearing, Clemmons expressed his surprise:

> [W]ell, I didn't find that out [regarding the purported admission] until after they was reading it into the record in front of the jury and said this. That's when I found out I was supposed to have made that statement.

No waiver of Clemmons' right to confrontation appears in the trial record. The deposition was simply read into evidence with no objection from Clemmons' counsel. Clemmons later asserted the violation of his right to confrontation in his motion for new trial and in several subsequent pleadings or proceedings, including a motion to

recall the mandate in the Missouri Supreme Court and in the state post-conviction proceedings.

Even though Clemmons had firmly maintained his innocence to all of the other corrections officers who spoke to him, Gross testified that Clemmons spontaneously volunteered the statement "I guess they got me" with absolutely no questioning or prompting. Clemmons allegedly made this statement the morning after the stabbing, at approximately 9:00 a.m.

Significantly, in his state and federal evidentiary hearings, Clemmons testified that if he had been present at the deposition and able to assist his counsel, then he could have drawn his counsel's attention to prison logs, later destroyed, which would have shown that he was not in Gross' presence at the time he supposedly made the inculpatory statement. In addition, Gross failed to note Clemmons' alleged inculpatory statement in the report he prepared on Johnson's stabbing.

The belated disclosure of Clemmons' alleged statement was coupled with the prosection's failure to turn over exculpatory evidence gathered by Captain Gross. Shortly after the stabbing, Gross had spoken to an inmate named Dwight Clark. Mr. Clark told Gross that he saw Fred Bagby stab Johnson. Gross reported Clark's statement in an interoffice investigative memorandum. However, the prosecution apparently failed to disclose this document to the defense.

According to testimony at the 29.15 hearing, Clemmons did not obtain this exculpatory memorandum until after the trial concluded. Even though three other inmates testified that Bagby, not Clemmons, had stabbed Johnson, the suppression of the Gross memorandum was highly significant because it undermined a key prosecution claim, namely, that the defense waited until after Bagby's death to accuse Bagby.

Bagby had died prior to Clemmons' trial, and the prosecution referred to him at trial as "conveniently dead." Dwight Clark, however, had named Bagby as the perpetrator within thirty minutes or so of the stabbing. Clark's statement to Gross, had it been properly disclosed, would have prevented the State from suggesting that the defense account of the killing was a recently concocted tale designed to blame someone who could not dispute his guilt.

REASONS FOR DENYING THE WRIT

I.

RESPONDENT "FAIRLY PRESENTED" HIS CLAIMS TO THE STATE APPELLATE COURT WHEN HE RAISED THEM IN A *PRO SE* PLEADING AFTER HIS ATTORNEY FAILED TO COMPLY WITH HIS EXPLICIT DIRECTIONS; RESPONDENT ALSO RAISED THE SAME CLAIM IN HIS FEDERAL HABEAS PROCEEDING AS HE RAISED IN HIS *PRO SE* MOTION FOR NEW TRIAL.

In his first argument, Petitioner: (1) mischaracterizes the holding of the Eighth Circuit Court of Appeals, (2) inaccurately describes the exculpatory investigative report underlying Respondent's Brady claim; and (3) fails to address the fact that Respondent preserved his claims by giving explicit directions to his court-appointed attorney and by notifying the appellate court of his claims in a motion for leave to file a supplemental brief. Contrary to Petitioner's argument, the Court of Appeals did not craft a "close enough" exception to the procedural default doctrine. Respondent's argument was the same in his federal habeas proceeding as it was in his *pro se* motion for new trial. Further, the Court of Appeals properly recognized that Respondent did all that he could to raise and preserve his claims and that there was no regularly followed procedural rule that barred the filing of a *pro se* supplemental brief.

The opinion of the Court of Appeals properly notes that as to major issues, the client "remains the master of his cause." The Court of Appeals stated:

> The fact remains that Clemmons called the attention of the Missouri Supreme Court to his Brady claim, among many others. We do not know what else he could have done, as a practical matter to present the claim to that court for decision on the merits. We therefore hold that the claim is fairly presented, and that the merits are now open for decision on federal habeas corpus.

See A-10, A-11.

Respondent asserts that he sufficiently presented his Confrontation Clause claim to the Missouri Supreme Court when he instructed his 29.15 appellate counsel to raise that issue and moved to file his own *pro se* brief incorporating pleadings that raised that issue.

The procedural default rule is based on principles of comity and federalism. If the state court ruling is made upon the basis of a state procedural rule, there may be a state law basis adequate to support the ruling independent of the federal constitutional claim. See Coleman v. Thompson, 501 U.S. 722 (1991). However, ". . .an adequate independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991) (quoting James v. Kentucky, 466 U.S. 341 (1984)). There is no indication whatsoever that the Missouri Supreme Court was relying on such a rule when it denied Mr. Clemmons leave to file a supplemental

pro se brief. In fact, the Missouri Supreme Court accepted a *pro se* brief from Respondent in his direct appeal. *Pro se* briefs have also been accepted by Missouri appellate courts in other cases. See, e.g., State v. Peterson, 518 S.W.2d 1, 2 (Mo. 1974) (acceptance of *pro se* brief by Missouri Supreme Court); see also Lamb v. State, 833 S.W.2d 9, 11 (Mo. Ct. App. 1992); McDonald v. State, 758 S.W.2d 101, 103 (Mo. Ct. App. 1988).

In other words, no procedural bar arose in Mr. Clemmons' 29.15 appeal because the denial of leave to file a *pro se* brief is not a state procedural rule that is "strictly or regularly adhered to." See Grubbs v. Delo, 948 F.2d 1459, 1462 (8th Cir. 1991), cert. denied, 506 U.S. 835 (1992).

In sum, because the Missouri Supreme Court does not have a rule prohibiting acceptance of *pro se* briefs, there is no state procedural rule that gives rise to a procedural bar in Mr. Clemmons' Rule 29.15 appeal. The absence of a procedural bar is underscored by the fact that Mr. Clemmons also raised the confrontation claim in his motion to recall the mandate in his 29.15 appeal. In his motion to recall the mandate, Mr. Clemmons explicitly referred to a *pro se* "addendum" which he filed in his Rule 29.15 proceeding. In his suggestions in support of his motion to recall the mandate, Mr. Clemmons specifically alerted the Missouri Supreme Court to the fact that he believed his 29.15 appeal counsel had performed in a deficient manner. Respondent stated:

> Mr. Robertson took it upon himself, against appellant's wishes and strong protests, to abandon all but six of the issues which were raised by a competent and licensed attorney at law in the original 29.15 proceedings in the circuit court. . .[A]s a result, appellant's right to be heard on other matters of greater importance has been compromised by Mr. Robertson's actions. . .

Respondent asserts that his *pro se* pleadings, coupled with his constant and explicit directions to his post-conviction attorney, were sufficient to preserve his claims for federal review. As the Court of Appeals correctly noted in its opinion, the client remains the "master of his cause." See A-9. When counsel in the 29.15 appeal ignored Clemmons' explicit directions and failed to brief the issues as requested by his client, Respondent "did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself." See A-10. By denying Respondent leave to file a supplemental *pro se* brief, the Missouri Supreme Court, in effect, cut off access to the state forum.

Petitioner also argues -- frivolously -- that Mr. Clemmons did not "fairly present" his Confrontation Clause claim in his *pro se* motion for new trial because the motion for new trial merely complained that the submission of Officer Steigerwald's deposition at trial was "both unconstitutional and unnecessary in that the witness was not legally unavailable." Petitioner asserts, with no basis whatsoever, that the Eighth Circuit fashioned a "close enough" exception in order to find that Clemmons had raised the same claim in his *pro se* motion for new trial as he raised in the federal habeas

proceeding. In fact, the Eighth Circuit fashioned no such exception. Respondent's claim, as stated in his *pro se* motion for new trial, is as follows:

> The court denied defendant the right to confront his accusor [sic], when the court allowed the State to read to the jury and into evidence the deposition of Mr. Gross. Such conduct was unconstitutional and unnecessary in that this witness was not legally unavailable, and in fact could have been subpoenaed to testify. The aforestated further denied defendant effective assistance of counsel in that a number of material inconsistancies [sic] (police reports and other documents recording previous statements that were inconsistant [sic] and in direct conflict with the deposition) were discovered by the defendant after the taking of this witnesses deposition. Thus defendant was denied the opportunity to place before the jury witnesses inconsistant [sic] statements, and was denied the opportunity for the jury to observe demenour [sic] of this witness.

See A-25. This allegation by Respondent clearly stated a violation of the Confrontation Clause. *Pro se* pleadings must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972). Clearly, Respondent "fairly presented" his claim in his *pro se* motion for new trial. Petitioner's argument to the contrary is wholly without merit and must be denied.

Finally, Respondent disputes Petitioner's characterization of the Brady evidence. Petitioner challenges the significance of an investigative memorandum, stating that it contained a report "of an eyewitness who did not see respondent's involvement in the crime." In fact, the eyewitness stated he saw the assault and named another individual, not Respondent, as the perpetrator.

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

II.

RESPONDENT'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER WAS VIOLATED WHEN THE TRIAL COURT ADMITTED THE DEPOSITION TESTIMONY OF A KEY PROSECUTION WITNESS WHEN THAT WITNESS NEVER TESTIFIED AT TRIAL, RESPONDENT HAD NO OPPORTUNITY TO ATTEND THE DEPOSITION, AND RESPONDENT DID NOT WAIVE HIS RIGHT TO CONFRONT THE WITNESS.

Petitioner frivolously argues that:

> The Court of Appeals' decision assumes the existence of a Constitutional right to attend a pre-trial deposition that may not be waived by counsel's decision not to procure respondent's attendance at the deposition or by counsel's decision not to object to the deposition's admission into evidence at trial.

Petitioner's argument turns the law on its head and misrepresents the Eighth Circuit's opinion. The Court of Appeals' decision "assumes" nothing. The Court of Appeals considered and soundly rejected Petitioner's contention that Respondent did not have a constitutional right to attend a pretrial deposition which was used in lieu of trial testimony.

The Court of Appeals held that "far from being a 'new rule' of constitutional law," Petitioner's claim "presents a paradigmatic violation of the Confrontation Clause as it has been traditionally interpreted by the Supreme Court." See A-27. As noted by the Eighth Circuit:

> [Respondent was] denied the right to face-to-face confrontation with one of his two accusers. . ., the right to have the jury observe the witness' demeanor, the right to participate in the cross-examination of the witness, and the right to observe the witness against him, in short every single element of the right to confrontation.

A-29. The violation of the Confrontation Clause is so clear cut that it is not a transgression "about which reasonable jurists may disagree." Id.

Apparently, Petitioner is arguing that no constitutional violation occurred when Respondent was not informed of the deposition and, further, that no violation occurred when the deposition was read into the record at trial without any finding that Respondent had waived his right to confrontation.

This constitutional violation is especially glaring in light of the fact that a provision in the Missouri Constitution, Article I, Section 18(b), specifically limits the use of depositions in lieu of live testimony in criminal cases to those taken under court orders which fully protect the defendant's right to personal confrontation and cross-examination. The inadmissibility of the Gross deposition was well established in Missouri law at the time of Respondent's trial. See State v. Jackson, 495 S.W.2d 80 (Mo. Ct. App. 1973).

Petitioner attempts to distract and mislead this Court by suggesting that the Court of Appeals held that Respondent's rights were violated when he was not permitted to attend the pretrial deposition. In fact, the constitutional violation did not occur until the deposition testimony was read into evidence at trial. Had Captain Gross testified at

trial, his deposition would simply have been another pretrial discovery deposition without any constitutional significance. However, because the State relied upon the deposition in lieu of live testimony at trial (and, in fact, intended to so use it from the outset), Respondent's right to confrontation was violated in the most fundamental fashion.

The right to confront one's accuser is one of the most elemental of constitutional protections. The right to confrontation traces its roots to "the beginnings of western culture." Coy v. Iowa, 487 U.S. 1012, 1015 (1988). It is an "essential and fundamental requirement for the kind of fair trial" which our constitution requires. Pointer v. Texas, 380 U.S. 400, 405 (1965). The violation of the right to confrontation is such a fundamental, structural error that prejudice is presumed. Brookhart v. Janis, 384 U.S. 1, 3-4 (1966).

Because of the importance of the rights being relinquished, the prerequisites of a valid waiver of constitutional rights must be "spread on the record." Boykin v. Alabama, 395 U.S. 238, 242 (1969). The court must never presume waiver from a silent record. Id. at 242. If the record does not reflect a valid waiver, then there is no waiver, and the judgment must be reversed. See Brookhart, 384 U.S. at 4-8. The right to confrontation is a personal right and cannot generally be waived through the words or actions of one's attorney. Carter v. Sowders, 5 F.3d 975, 981-82 (6th Cir. 1993), cert. denied, 511 U.S. 1097 (1994). As noted by the Sixth Circuit, it is the

accused, not counsel, who "must be confronted with the witnesses against him." Id. at 981-82. Consequently, the right to defend "is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 982.

In the present case, the record is totally devoid of any indication of a waiver by Respondent. With no objection from defense counsel, the deposition of Captain Gross was read into the record. Apparently, Gross' wife had just passed away, and the deposition was taken to allow Captain Gross to attend to family matters. The deposition transcript reflects, and Respondent's later testimony confirms, that Respondent was not present for the deposition and was not even aware that the deposition had been taken.

Under these circumstances, the silent trial record establishes that no waiver was made of the right to confrontation by Respondent. Because the waiver must be clear and spread on the record, the Court of Appeals necessarily found that Respondent did not waive his right to confrontation. A violation of the right to confrontation involves such a fundamental, structural error that prejudice is presumed. Brookhart, 384 U.S. at 3-4. Nonetheless, it is important to note the extreme prejudice suffered by Respondent as a result of the use of the Gross deposition. Respondent's trial attorney learned of the supposed admission made by Respondent to Gross ("I guess they got me") only a couple of weeks before the trial, in violation of Missouri discovery rules. Respondent's attorney never informed Respondent of the statement before trial.

Further, as Respondent testified at the federal evidentiary hearing, it would have been impossible for him to make such an admission to Captain Gross at the time he supposedly did, as he was nowhere in the vicinity of Captain Gross at that time. Had Respondent been present at the deposition, he could have assisted his attorney in conducting a more effective cross-examination of Gross. He also could have directed his attorney to obtain movement logs and other documents (which were later destroyed) which would have shown that Gross did not have access to Respondent at the time he made the supposed admission, "I guess they got me."

It is difficult to imagine a more straightforward violation of the right to confrontation than the one which occurred here. There is simply no basis whatsoever to claim that the Court of Appeals relied on a "new rule" of law and applied it retroactively in a habeas proceeding. Petitioner's argument is baseless.

Petitioner also attempts to argue that the admission of the deposition testimony did not violate the right the right to confrontation because Captain Gross was an unavailable witness and the testimony was sufficiently reliable. In fact, there was no showing whatsoever that Captain Gross was unavailable within the meaning of the Sixth Amendment. Moreover, the testimony was presumptively unreliable because, in this instance, counsel conducted the cross-examination without the aid of the defendant. Moreover, the defendant was deprived of physical confrontation, and the jury had no

opportunity to observe the demeanor of the witness. Under these circumstances, the right to confrontation was clearly violated.

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

III.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DETERMINING THE CORRECT STANDARD FOR HARMLESS ERROR ANALYSIS CONDUCTED BY A FEDERAL HABEAS COURT WHEN THE STATE COURT NEVER CONDUCTED A HARMLESS ERROR ANALYSIS BECAUSE PETITIONER NEVER RAISED THIS ISSUE IN THE COURT OF APPEALS, THE VIOLATION OF RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE CANNOT BE CONSIDERED HARMLESS ERROR UNDER EITHER STANDARD AND BECAUSE PETITIONER DOES NOT EVEN ASSERT THAT RESPONDENT'S BRADY CLAIM IS HARMLESS ERROR.

Petitioner asserts that certiorari is appropriate in this case to resolve a conflict in the Circuits on what standard of review should be applied for harmless error when the state court did not conduct a harmless error review -- the "substantive and injurious effect" standard of Brecht v. Abrahamson, 507 U.S. 619 (1993), or the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967). Petitioner distinguishes Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993), from cases in the Fourth, Seventh, Tenth, and Eleventh Circuits. However, Petitioner never questioned Orndorff in the Court of Appeals. Moreover, a fair reading of the opinion below reveals a proper application of the principles set forth in O'Neal v. McAninch,

513 U.S. 432 (1995). Furthermore, any conflict need not be resolved in this case, since Petitioner does not assert harmless error under either standard with regard to Respondent's claim that exculpatory evidence was withheld in violation of Brady v. Maryland, 373 U.S. 83 (1963).

It is axiomatic that, when a litigant fails to raise a challenge in a timely fashion or concedes an issue below, it cannot be raised in later proceedings. See, e.g., Steagald v. United States, 451 U.S. 204, 208-09 (1981); Pembaur v. City of Cincinnati, 882 F.2d 1101, 1106 (6th Cir. 1989); United States v. Morales, 737 F.2d 761, 763 (8th Cir. 1984). Petitioner now asserts that the Court of Appeals incorrectly applied the harmless beyond a reasonable doubt standard of Chapman v. California, 386 U.S. 18 (1967), to the violation of Respondent's Sixth Amendment rights under the Confrontation Clause. Petitioner asserts that the Court of Appeals rather should have applied the "substantive and injurious effect" standard of Brecht v. Abrahamson, 507 U.S. 619 (1993). However, in the Court of Appeals, Petitioner did not distinguish between these two standards. Rather, Petitioner argued below:

> Furthermore, [Clemmons] fails to demonstrate any prejudice. As the district court correctly noted, "the state can plausibly assert that the deposition would probably gone off as it did even if petitioner had been present." [Citation omitted.] The district court, however, held that this was "surely unknowable, and contrary to the psychological theory behind the confrontation clause." [Citation omitted.] The "unknowable" does not meet the harmless error analysis set forth in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), or Brecht v. Abrahamson, ___ U.S. ___, 113 S. Ct. 1710, 126 L. Ed. 2d 353 (1993).

Supplemental Brief of Appellee at 20.

In the conclusory paragraph to point one of his supplemental brief, Petitioner went on to assert, "Moreoever, [Clemmons] fails to demonstrate that the error was not harmless." Id. No other discussion concerning the proper standard to be applied in conducting harmless error analysis appears in Petitioner's briefs in the Court of Appeals. This Court should not grant certiorari to resolve an issue that was not properly presented to the court below.

In O'Neal v. McAninch, 513 U.S. 432 (1995), this Court verified the holding of Brecht. Brecht has been read as placing upon the habeas petitioner the burden of showing that claimed constitutional error was not harmless (an erroneous reading reflected in Petitioner's argument. In O'Neal, this Court made it perfectly clear that, "when a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." O'Neal, 513 U.S. at 436. In this context, the opinion of the Court of Appeals clearly reflects such grave doubt:

> We do not know whether Captain Gross's testimony would have been different nor do we know to what extent it might have been different had Mr. Clemmons been notified and allowed to be present. That is, however, exactly the point. The burden is on the State here to show harmlessness, and it cannot do so.

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Although the Court of Appeals discussed this issue in terms of the Chapman standard, it is clear that had it applied the Brecht standard, it would have reached the same conclusion.

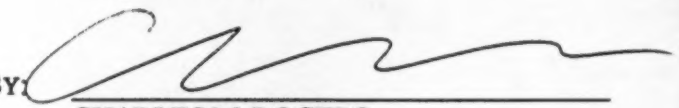
Significantly, Petitioner makes no assertion that the State's failure to disclose Captain Gross' memorandum memorializing Dwight Clark's identification of Fred Bagby as the perpetrator of the murder constituted harmless error. As the Court of Appeals held, and as Petitioner apparently concedes, Respondent is entitled to relief on this claim absent any procedural bars. Since the holding of the Court of Appeals may be upheld on the Brady claim without reaching the Confrontation Clause claim and certainly without reaching the issue of the standard of harmless error review concerning the Confrontation Clause claim, the philosophy of judicial restraint militates against granting certiorari to decide the non-issue regarding the proper standard for harmless error review.

The question presented in Part III of the Petition for Writ of Certiorari was not presented to the Court of Appeals. It is clear from the opinion below that the Court of Appeals would not have found denial of Respondent's Confrontation Clause rights harmless under either standard. Moreover, Respondent is entitled to relief on his Brady claim, which Petitioner concedes is not harmless error. For these reasons, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests this Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and confirm the judgment of that Court.

Respectfully submitted,

BY: 

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